United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-1308 5

To be argued by
MORRIS RUBENSTEIN

United States Court of Appeals
For the Second Circuit

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P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee

-against-

JOEL RAKOFSKY,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

Appellant's Brief

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CASES CITED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Number 76-1309

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOEL RAKOFSKY,

Defendant-Appellant.

On Appeal from the United States
District Court for the
Eastern District of New York

DEFENDANT-APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The Appellant, Joel Rakofsky appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York (Judd, J.) adjudging him guilty of two counts of violating Title 18, United States Code, Section 894(a); collection of extensions of credit by extortionate means. As a result of this conviction, Appellant was sentenced to a One Thousand ($1,000.00) Dollars fine and placed upon probation for a period of two (2) years.

STATEMENT OF FACTS

The Appellant was indicted alleging three violations of the Federal Extortion Statutes, Title 18, United States Code, Section 891 and 894(a). Appellant was acquitted of violating Section 891 and found guilty of Counts 6 and 7 of the Indictment charging violations of Section 894(a).

On September 27, 1974, a complaint was filed with the Federal Magistrate in the Eastern District of New York charging the Appellant along with three codefendants of violating Title 18, United States Code.

On April 2, 1975, an Indictment was filed in the United States District Court and docketed as No. 75CR 261. This Indictment charged the same alleged criminal conduct which was charged in the underlying complaint. The Indictment names an additional defendant, Palmer "Pat" Lombardi, and introduces reference to Daniel Gilberti, an unindicted co-conspirator. It is clear from the pleadings that each of the counts in the Indictment relate to the same "common scheme or plan." *Rule 8, Federal Rules of Criminal Procedure.*

The Indictment was filed more than six (6) months after both the filing of the underlying complaint and the arrest of the defendants. It is self-evident, therefore, that the Government failed to comply with Rule 4 of the Eastern District Plan by their failure to prepare this case for trial within six (6) months from the date of the filing of the underlying complaint.

Rule 4 of the Eastern District Plan provides in relevant part that:

> "In all cases the government must be ready for trial within six months from the date of the arrest, service of the summons, detention, or the filing of a

> complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with noncapital offenses, the defendant may move in writing, on at least ten days notice to the government, for dismissal of the indictment."

On May 8, 1975, a motion was made to dismiss the Indictment against the defendants, Cavitolo and DeFilippo. On May 9, 1975, an application was made in open Court before Judd, J. to grant the Appellant leave to join in said motion to dismiss the Indictment as against the defendant Rakofsky by reason of the government's failure to Comply with Rule 4. That motion was granted by Judd, J.

The Court below denied the motion to dismiss the indictment.

The Government has the singular responsibility for communicating its readiness for trial "in some fashion" within six months period. *United States v. Pierro*, 478 F 2d 386. (2nd Cir., 1973). There is absolutely no burden placed upon the defendant to insure that the Government is ready within the six months period. Rule 7 of the Plan provides in relevant part that:

> "A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules".

The efficacy of these rules is no longer subject to challenge by the Government. *United States v. Fuery* ——F.2d—— (2nd Cir., February 25th, 1975), sl. op. p. 1917. In order to "put teeth into the scheme", the sanction provided by Rule 4 *is dismissal of the Indictment with prejudice. Hilbert v. Dooling*, 476 F.2d 355 (2nd Cir., 1973).

The Government may argue that their failure to comply with the Plan in this case should be excused because the Indictment was returned only some six days after the six month period had elapsed. Any such argument is foreclosed, however, by the Circuit Court's decision in *United States v. McDonough*, 504 F.2d 67 (2nd Cir., 1974). The Court there stated that:

> ". . . there is no *de minimis* time period under the six month rule; the Government 'must be ready for trial within six months . . . 'not six months and three days, four days, five days or nine days. This has to be the case since we are dealing with a clear line of time—much like a statute of limitations—marked for prophylactic purposes, not be analogized to the equitable doctrine of laches. There are any number of 'excluded periods' under Rule 5 of the plan on which the Government may base a claim to toll the period, but the period itself is fixed, clearly, sharply and without qualification, at six months."

The question for this Court, therefore, is whether in the instant case, there are any excludable periods under Rule 5 of the Plan. The Government now has the burden to establish those times to be excluded from the six-month period. *United States v. Flores*, 501 F2d 1356 (2nd Cir., 1974. It is then incumbent upon the Court to make specific findings on any alleged excusable periods of delay. *United States v. Pollack*, 474 F2d 828 (2 Cir., 1973). In *United States v. Flores*, supra, the Circuit Court notes that a Government witness who refused to testify before the Grand Jury is "not unavailable" within the meaning of Rule 5 and that such a phenomenon would not justify the delay. Although, perhaps, refined and somewhat broadened, this Indictment charges the same criminal violations which were charged in the September 27th

complaint. *United States v. Kaye*, 334 F. Supp. 326 (E.D.N.Y. 1971). It was there stated:

> " . . . revelations in the course of investigation indicating that the defendants may also be involved in other criminal schemes does not bear at all on whether the time within which the defendants can be prosecuted on the charges actually brought against them should be extended."

The Government, in this case has offered no evidence or indication that there was an excusable period of delay. For these reasons, the judgment of conviction should be reversed and the Indictment dismissed.

This Appellant for the purposes of brevity, pursuant to Rule 28 I, adopts by reference the arguments set forth in the brief of the Appellant, Cavitolo 76-1305.

CONCLUSION

THE JUDGMENT OF CONVICTION HEREIN SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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Joel Rakofsky

Morris Rubenstein
Of Counsel

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the ___ day of ___ 197_ deponent served the within _____ upon:

attorney(s) for

in this action, at

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this ___
day of _____, 197_

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977